

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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STATE OF OKLAHOMA, <i>et al.</i>	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., <i>et al.</i>	)	
	)	
Defendants.	)	
	)	

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**REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY  
JUDGMENT ON COUNTS 6 & 10 OF THE SECOND AMENDED COMPLAINT AND  
INTEGRATED BRIEF IN SUPPORT (DKT. NO. 2055)**

Summary judgment should be granted to dismiss Plaintiffs’ trespass and unjust enrichment claims (Counts 6 & 10).<sup>1</sup> The relevant facts for each inquiry are undisputed and ripe for judgment as a matter of law. The governing law<sup>2</sup> is equally clear, and demonstrates that Plaintiffs cannot satisfy the elements of either claim.

### **I. Plaintiffs Cannot Establish the Elements of Their Trespass Claim**

Plaintiffs do not contest that the elements of a trespass claim require: (i) a possessory property interest in the property;<sup>3</sup> (ii) “actual and exclusive possession” of the property;<sup>4</sup> and (iii) an invasion without legal authorization or the consent of the person lawfully entitled to possession.<sup>5</sup> Plaintiffs cannot establish any of these requirements, as a matter of law.

#### **A. Plaintiffs Do Not Have the Required Possessory Property Interest in the Waters**

As detailed in Defendants’ motion to dismiss pursuant to Rule 19, the Cherokee Nation—not the State of Oklahoma—is the sovereign owner and trustee of the waters in the Oklahoma portion of the IRW.<sup>6</sup> Because Plaintiffs do not maintain a possessory property interest in such waters, their trespass claim must be dismissed. *See* Mot. at 8-10.

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<sup>1</sup> *See Defendants’ Joint Motion for Summary Judgment on Counts 6 & 10*, Dkt. No. 2055 (May 15, 2009) (“Motion” or “Mot.”).

<sup>2</sup> As explained in the *Reply in Support of Defendants’ Joint Motion for Summary Judgment on Counts 4 & 5*, Dkt. No. 2231 at 1-2, Arkansas law must apply to conduct occurring in Arkansas.

<sup>3</sup> *See* Mot. at 8-10; June 15, 2007 Hearing Tr. at 176:11-22 (Mot. Ex. 1).

<sup>4</sup> Mot. at 10-11 n.4; *see, e.g., New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1235 (D. N.M. 2004), *aff’d* by 467 F.3d 1223, 1248 n.36 (10th Cir. 2006).

<sup>5</sup> *See* Mot. at 14-15, 14 n.8; *see, e.g., Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001) (*en banc*).

<sup>6</sup> *See* Dkt. No. 1788 at 4-14; Dkt. No. 1825. Plaintiffs incorrectly assert that “the Court [has] impliedly recognized” that the State owns the waters in the Oklahoma portion of the IRW flowing in definite streams. Dkt. No. 2131 at 12 (June 2, 2009) (“Opposition” or “Opp.”) (citing Dkt. No. 1439 (Jan. 7, 2008)). The January 7, 2008 Order in no way affirmed the State’s ownership of such waters, and instead merely ruled on the sufficiency of Plaintiffs’ *allegations*. *See id.*; *Realmonite v. Reeves*, 169 F.3d 1280, 1283 (10th Cir. 1999) (court must accept well-pleaded factual allegations as true and view them in a light most favorable to the plaintiff); June 15, 2007 Hearing Tr. at 176:11-22 (Mot. Ex. 1). No substantive ruling has been entered in this case with respect to the ownership rights of either the Cherokee Nation or the State of Oklahoma.

## **B. Plaintiffs Cannot Obtain the Cherokee Nation's Interests by Assignment**

Plaintiffs assert that the Court need not be concerned that Oklahoma does not own or hold in trust the natural resources at issue because the Cherokee Nation has purportedly assigned any claims it may have to Plaintiffs.<sup>7</sup> *See* Opp. at 12 n.4. This argument is incorrect for three reasons: (i) the attempted agreement between the Attorney General and the Cherokee Nation is unlawful; (ii) the claims at issue cannot be assigned under Oklahoma law; and (iii) even if the attempted agreement were valid, it does not resolve the issues raised in the Rule 19 motion.

*First*, under Oklahoma law, a state official cannot unilaterally contract with an Indian Tribe on behalf of the State. Rather, Oklahoma law mandates specific procedures that must be followed in entering into agreements with Indian Tribes, and requires that certain state and federal officials approve any such agreements. Specifically, 74 O.S. § 1221 provides:

C. 1. The Governor, or named designee, is authorized to negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian Tribal Governments within this state to address issues of mutual interest. ...

2. If the cooperative agreements specified and authorized by paragraph 1 of this subsection involve trust responsibilities, approval by the Secretary of the Interior or designee shall be required.

3. Any cooperative agreement specified and authorized by paragraph 1 of this subsection involving the surface water and/or groundwater resources of this state ... shall become effective only upon the consent of the Oklahoma Legislature authorizing such cooperative agreement.

*Id.* This statute is the exclusive means by which the Attorney General could enter into an agreement with the Cherokee Nation, yet the Purported Agreement does not adhere to several requirements imposed by Section 1221. For instance, the Purported Agreement was not

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<sup>7</sup> On May 20, 2009, Plaintiffs filed a document that is signed by the Attorney General, but which purports to be an agreement between the Cherokee Nation and the State of Oklahoma. *See* Dkt. No. 2108 Ex. 1 ("Purported Agreement"). The legal defects with this attempt to side-step the issue of who owns the natural resources in the IRW are explained in greater detail in Dkt. No. 2110 (May 21, 2009), and Defendants' proposed *Brief Regarding State Of Oklahoma's Notice Of Filing Of Document*, Dkt No. \_\_, Ex. 1 (request for leave to file pending).

negotiated and executed by “[t]he Governor, or [his] named designee.” 74 O.S. § 1221(C)(1).<sup>8</sup>

Similarly, the Purported Agreement “involve[s] trust responsibilities,” and therefore is not valid unless and until it is approved by the Secretary of the Interior or his designee. 74 O.S.

§ 1221(C)(2). No such approval has been obtained. Finally, the Purported Agreement fails to comply with the requirement that an agreement “involving the surface water and/or groundwater resources of” the State must obtain the approval of the Legislature. 74 O.S. § 1221(C)(3).

*Second*, Oklahoma law forbids the assignment of tort claims. This is the general common law rule, which Oklahoma adopted shortly after becoming a state.<sup>9</sup> Oklahoma codified this prohibition in 12 O.S. § 2017(D), which states “[t]he assignment of claims not arising out of contract is prohibited.”<sup>10</sup> Oklahoma courts have consistently applied this prohibition, both historically and recently.<sup>11</sup> Because the Purported Agreement seeks to assign tort claims, *see* Purported Agreement at 2 ¶1, in violation of Oklahoma law, the Purported Agreement is invalid.

*Third*, even if the Purported Agreement were valid between its parties, this last-minute, retroactive arrangement is insufficient to cure the standing defect noted in Defendants’ Motion to Dismiss. The “irreducible constitutional minimum of standing” is an “indispensable part of the plaintiff’s case.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 569 n.4 (1992). Thus, Plaintiffs may not simply agree with the Cherokee Nation to overlook their standing deficiencies, nor may they stipulate their standing to this Court. Because “standing is an Article III

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<sup>8</sup> The Purported Agreement recognizes that the parties signing the agreement must have valid authority. *See* Purported Agreement at 1, 2 ¶¶5, 7. But, since the Governor is not a signatory and did not designate the Attorney General to negotiate and execute that agreement pursuant to Section 1221, the Attorney General acted *ultra vires*.

<sup>9</sup> *See Dippel v. Hunt*, 517 P.2d 444, 446 (Okla. Civ. App. 1973) (citing *Kansas City M. & O. Ry. Co. v. Shutt*, 104 P. 51 (Okla. 1909)).

<sup>10</sup> Prior to the enactment of Section 2017(D), the rule against assignment of claims was incorporated in 12 O.S. § 221 (repealed 1984).

<sup>11</sup> *See, e.g., Rose Group, L.L.C. v. Miller*, 64 P.3d 573, 575 (Okla. Civ. App. 2003); *Aetna Cas. & Sur. Co. v. Associates Transports*, 512 P.2d 137, 140 (Okla. 1973).

requirement for jurisdiction, the parties do not have the power to confer such jurisdiction upon the Court by conceding the standing of certain plaintiffs.”<sup>12</sup> Plaintiffs and the Cherokee Nation simply have no authority to “agree” that Plaintiffs have “sufficient interests in the lands, water and other natural resources of the [IRW] to prosecute claims” raised in this suit. Purported Agreement at 1 cl. 6; *see Wilson*, 98 F.3d at 593. Plaintiffs and the Cherokee Nation may not take it upon themselves to relieve this Court of its duty to “resolve the precise nature of each sovereign’s interest” in the IRW, merely to avoid the “time and expense” associated with evaluating standing. Purported Agreement at 1 cl. 8.<sup>13</sup> Nor may Plaintiffs and the Cherokee Nation agree that this Court need not decide which of them has standing simply because one of them does. *See Compagnie*, 456 U.S. at 702. Moreover, “standing is to be determined as of the commencement of the suit,” based upon “the facts existing when the complaint is filed.” *Lujan*, 504 U.S. at 569 n.4, 570 n.5. Thus, Plaintiffs cannot *retroactively* cure standing defects that existed at the time litigation commenced. Rather, the personal interest required for a justiciable cause “must exist at the commencement of litigation.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Further, a plaintiff may not cure standing defects through an agreement, executed after commencement of the lawsuit, simply because that agreement applies retroactively.<sup>14</sup> Such post-hoc assignments fail to remedy the fact that *when*

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<sup>12</sup> *Barhold v. Rodriguez*, 863 F.2d 233, 234 (2d Cir. 1988); *see Golden v. Government of the Virgin Islands*, 47 Fed. App. 620, 622 (3d Cir. 2002); *Wilson v. Glenwood Intermountain Props.*, 98 F.3d 590, 593 (10th Cir. 1996). Not even an agreement between Plaintiffs and Defendants could confer standing, *see id.*, much less one between Plaintiffs and a third party. Indeed, “the consent of the parties [to subject matter jurisdiction] is irrelevant.” *Ins. Corp. of Ir. Ltd. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982).

<sup>13</sup> *See Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) (“purely practical considerations” cannot control the scope of federal subject matter jurisdiction); *Denver v. Matsch*, 635 F.2d 804, 808 (10th Cir. 1980) (same).

<sup>14</sup> *See Messagephone, Inc. v. SVI Systems, Inc.*, 2000 U.S. App. LEXIS 19976, \*13 (Fed Cir. 2000); *Enzo APA & Son, Inc. v. Geapag A.G.*, 134 F.3d 1090, 1092-93 (Fed. Cir. 1998). For

*the complaint was filed*, no valid transfer of rights had occurred. *See Paradise Creations, Inc.*, 315 F.3d 1304, 1309-10 (Fed. Cir. 2003); *Enzo*, 134 F.3d at 1093. Like these cases, Plaintiffs plainly seek to circumvent the fact that, at the commencement of the lawsuit, no assignment of rights had been made (if such an assignment of rights were legally possible). *See Purported Agreement* at 2 ¶8. Even an assignment of merely the Cherokee Nation’s right to *sue* based upon its property interests in the IRW cannot retroactively establish standing.<sup>15</sup> Thus, whether or not the Purported Agreement is deemed valid between its parties, this eleventh-hour arrangement may not retroactively repair the standing defect noted in Defendants’ Motion to Dismiss.

Finally, as noted above, the elements of Plaintiffs’ trespass claim cannot be established without knowing which plaintiff owns the natural resources at issue. *See supra* at 1.

### **C. Plaintiffs Do Not Maintain “Actual and Exclusive” Possession of Public Waters**

No matter who actually owns the waters, Plaintiffs’ trespass claim must fail because the State of Oklahoma does not—and as a matter of law cannot—maintain the requisite “actual and exclusive” possession of public waters. *See Mot.* at 10-13. Plaintiffs’ contrary interpretation of the “actual and exclusive” requirement is unsupported by law.

As an initial matter, Plaintiffs do not identify a single instance in which a court has recognized a trespass claim premised upon an alleged invasion of public waters. *See Opp.* at 12-15.<sup>16</sup> Instead, each of the referenced cases regarding the pollution of public waters were raised

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example, courts routinely refuse to confer standing based upon written agreements that retroactively assign patent rights to the plaintiff. *See, e.g., Messagephone*, 2000 U.S. App. LEXIS 19976, \*11-15; *Enzo*, 134 F.3d at 1092-93; *Gaia Techs., Inc. v. Reconversion Techs., Inc.*, 93 F.3d 774, 779-80 (Fed. Cir. 1996); *Merial Ltd. v. Intervet Inc.*, 430 F. Supp. 2d 1357, 1362 (N.D. Ga. 2006).

<sup>15</sup> *See Berger v. Weinstein*, 2008 U.S. Dist. LEXIS 59948, \*19-20 n.4 (E.D. Pa. August 6, 2008); *Hill v. Martinez*, 87 F. Supp. 2d 1115, 1121 (D. Colo. 2000).

<sup>16</sup> Such a result is not surprising, as by definition the government’s interest in and possession of such public property is not “actual and exclusive.” *Mot.* at 10-13; *see, e.g., New Mexico*, 335 F.

under the common law claim of public nuisance—not trespass. *See* Opp. at 12-15; *see, e.g., Selma Pressure Treating Co. v. Osmose Wood Preserving*, 221 Cal. App. 3d 1601, 1616 (Cal. App. 5th Dist. 1990). Further, the remaining authority cited does not support Plaintiffs’ argument, as those cases involved private—not public—property.<sup>17</sup>

Additionally, Plaintiffs’ attempt to distinguish their claim from the analogous circumstances presented in *New Mexico* and *Mathes* fails in several respects. *See* Opp. at 14. *First*, Plaintiffs assert that the holdings should be disregarded as irrelevant applications of New Mexico and Virgin Islands law, yet do not identify a single distinction under Oklahoma or Arkansas law with respect to the common law analyses contained therein. *See* Opp. at 14, 14 n.8. *Second*, Plaintiffs’ assertion that the trespass claim is premised *solely* on their private ownership interests flatly contradicts Plaintiffs’ prior statements, and in any event, would require dismissal of the claim pursuant to the applicable statute of limitations. In order to avoid application of the statute of limitations, Plaintiffs previously stated that their trespass claim represented a “public-interest action” based solely on the State’s sovereign interests in protecting “public water” in Oklahoma. Dkt. No. 1917 at 17-18 (“The State’s Trespass Claim Does Not Arise From Private Rights” and should not be characterized as a claim based on the State’s “possessory interest in ‘government property’—public water—in a manner identical to a private litigant.”). Yet, Plaintiffs now argue that “the State’s claim for trespass is based upon its possessory property interest in waters” and “is being brought on the basis of an ownership interest” seeking the same “rights to redress [as] an individual whose property interests are injured.” Opp. at 12, 14 n.8, 15. Notwithstanding Plaintiffs’ conflicting statements, Plaintiffs

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Supp. 2d at 1231-35; *Mathes v. Century Alumina Co.*, 2008 U.S. Dist. LEXIS 90087, \*28 (D. V.I. Oct. 31, 2008).

<sup>17</sup> *See* Opp. at 13; *e.g., Cooperative Refinery Ass’n v. Young*, 393 P.2d 537, 540 (Okla. 1964).

simply cannot have it both ways as a matter of law. The trespass claim must either constitute: (i) an action vindicating public rights raised pursuant to the State's *parens patriae* or public trust interests—in which case the same reasoning and analysis adopted by the courts in *New Mexico* and *Mathes* requires dismissal of the claim, *see* Mot. at 10-13; *or* (ii) an action premised on the State's alleged ownership interests (in the same manner as an individual whose property interests may be injured by a trespass)—in which case the claim must be dismissed in accordance with the applicable statute of limitations, *see* Dkt. No. 1917 at 17-18.

#### **D. The State Of Oklahoma Authorized and Consented to the Alleged Trespass**

The Animal Waste Management Plans (AWMPs) and Nutrient Management Plans (NMPs) that are drafted, approved and issued by state agents pursuant to Oklahoma's and Arkansas' comprehensive poultry litter laws and regulations constitute legal authorization for the application of poultry litter in conformance with the specific instructions contained therein. *See* Mot. at 13-19. As detailed in *Defendants' Joint Motion for Summary Judgment on Counts 7 & 8*, Dkt. No. 2057 (May 18, 2009),<sup>18</sup> these site-specific instructions do not contain mere "guidance." *See id.* at 16-24. Instead, these plans are required permits, which the state issues and mandates strict compliance with the instructions contained therein. *See id.*<sup>19</sup> Because Plaintiffs have not identified evidence of any specific violations of these plans,<sup>20</sup> Plaintiffs' trespass claim must be

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<sup>18</sup> This issue will be also discussed at length in the Reply to be filed in support of this motion.

<sup>19</sup> At a minimum, Plaintiffs' proposed interpretation of Arkansas' litter management plans as "guidance documents" must be rejected. Arkansas law does not contain any of the general provisions relied upon by Plaintiffs under Oklahoma law, *see* Mot. at 20 n.20; Opp. at 22-23, nor do the Arkansas litter management plans caution that compliance with the specific instructions contained therein could still result in a violation, *see, e.g.*, Mot. Ex. 17 at 8 ("The contents of this document are *legally binding and must be implemented* through farm practices and procedures.") (emphasis added). Plaintiffs have identified no legal basis to interpret the Arkansas regulations and plans as anything other than authorization to perform the activity. Accordingly, summary judgment should be granted against Plaintiffs' claims arising from conduct in Arkansas.

<sup>20</sup> *See* Mot. at 4 ¶¶8, 19-20; Dkt. No. 2183 at 18-19 ¶¶39 n.77. Plaintiffs improperly attempt to

dismissed. *See* Mot. at 13-19; *Carson Harbor*, 990 F. Supp. at 1197, *aff'd* 270 F.3d at 870.

Plaintiffs' alternative arguments—which seek to circumvent the Oklahoma and Arkansas Legislatures' express authorization of the regulated activity—are not supported by the facts or governing law. *First*, while Plaintiffs are correct that authorization to perform a general activity may not be enough to avoid liability,<sup>21</sup> this principle is inapplicable where (as here) the regulations set forth specific instructions detailing actions that may be taken in accordance with the law. *See* Mot. at 3-4 ¶¶6-8, 13-19; *see, e.g., Carson Harbor*, 990 F. Supp. at 1197. *Second*, that the States have, through enactment of their comprehensive poultry litter management laws and regulations, consented to the land application of poultry litter in the IRW is not “absurd.” *Opp.* at 20. The Arkansas and Oklahoma statutes regulating poultry litter express their respective legislature's best judgment as to the appropriate balance between the agricultural and economic benefits from the use of poultry litter as a fertilizer and sound environmental protections.<sup>22</sup> Absent evidence that litter is applied in violation of the specific requirements set forth in the regulations and litter management plans, Plaintiffs cannot impermissibly usurp these legislative judgments through litigation.<sup>23</sup>

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shift the burden of proof to Defendants on this point. *See Opp.* at 24. The law requires that Plaintiffs—not Defendants—satisfy the burden of proof with respect to each element of the claim. *See Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004). Because Defendants cannot be held liable for applications of poultry litter in conformance with the law, Plaintiffs must tailor their evidence and claims to exclude reference to this conduct.

<sup>21</sup> *See Opp.* at 21, 23. For example, laws authorizing installation of a railroad do not authorize its construction according to specifications creating a public nuisance. *See McKay v. City of Enid*, 109 P. 520, 521 (Okla. 1910).

<sup>22</sup> The Arkansas and Oklahoma legislatures have explicitly recognized the benefits of poultry litter and have balanced the benefits and risks. *See* A.C.A. §§ 15-20-902 (1), (2); A.C.A. § 15-20-1102; O.A.C. § 35:17-5-1; *see* 2 O.S. § 10-9.1-12.

<sup>23</sup> *See E.I. Du Pont de Nemours Powder Co. v. Dodson*, 150 P. 1085, 1087 (Okla. 1915) (“when the Legislature allows or directs that to be done which would otherwise be a nuisance, it must be presumed that the Legislature is the proper judge of what the public good requires”).

## II. Plaintiffs Cannot Establish The Elements Of Their Unjust Enrichment Claim

Unjust enrichment requires “enrichment to another coupled with a resulting injustice.” *County Line Inv. Co. v. Tinney*, 933 F.2d 1508 (internal quotations omitted); *see* Mot. at 19 (citing authority). Plaintiffs cannot satisfy either of these requirements as a matter of law.

### A. Plaintiffs Cannot Demonstrate Any *Unjust* Enrichment Because the Land Application of Poultry Litter in the IRW Is Authorized by Law

A party that acts in accordance with existing law cannot be held liable for *unjust* enrichment. *See* Mot. at 24 (citing authority).<sup>24</sup> Because the land application of poultry litter in the IRW is authorized by the comprehensive litter management laws and regulations of Oklahoma and Arkansas, *see supra* at 7-8, Plaintiffs cannot establish that Defendants have been *unjustly* enriched as a result of this activity. *See* Mot. at 24-25.

### B. Plaintiffs Cannot Demonstrate that Defendants Have Been Enriched

Plaintiffs assert without explanation that the “State of Oklahoma has incurred costs totaling at least \$3.8 million as a result of Defendants improper waste disposal.” *Opp.* at 23 (citing *id.* at 5-6 ¶9). But, the alleged costs referenced by Plaintiffs are not recoverable because they were not incurred by the State as a result of Defendants’ alleged conduct. *See* Mot. at 20 n.18 (each alleged cost incurred as a result of state-wide programs initiated and operated without reference to the conduct at issue in this litigation). Significantly, Plaintiffs do not offer any factual or legal authority to dispute the analysis set forth in Defendants’ Motion. *See Opp.* at 23.

Plaintiffs also argue that Defendants should be held liable under Count 10 because Defendants allegedly retained “unjust savings” by “avoid[ing] costs from not transporting their waste out of the IRW.” *Opp.* at 21-22. But, Plaintiffs’ theory is not supported by admissible evidence or the governing law. *First*, Plaintiffs’ theory and related damages calculations are

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<sup>24</sup> Notably, Plaintiffs do not contest this well-established principle of law. *See Opp.* at 22.

supported solely by the inadmissible opinions of C. Robert Taylor.<sup>25</sup> *Second*, Plaintiffs' cost avoidance theory is not available under Arkansas law. *See* Mot. at 21. As explained in Defendants' Motion, no Arkansas court has ever recognized an unjust enrichment claim based on this novel premise.<sup>26</sup> Furthermore, the Eighth Circuit has held that it is inappropriate for a federal court to read such a theory into state law.<sup>27</sup> Because Plaintiffs fail to identify any authority supporting such a claim under Arkansas law, *see* Opp. at 21-22, summary judgment is appropriate as it applies to conduct occurring in Arkansas, *see supra* at 1 n.2. *Third*, Defendants cannot be held liable pursuant to Plaintiffs' cost avoidance theory under Oklahoma law because Defendants do not have an affirmative requirement or duty to incur costs with respect to the transfer of poultry litter outside of the IRW.<sup>28</sup> Defendants neither own the poultry litter that results from the growing process, *see* Mot. at 6 ¶19, nor have any contractual or legal requirement or duty with respect to any aspect of the Growers' management, use, sale or transfer of their poultry litter, *see* Mot. at 6-7 ¶¶22-26, 22-23. Specifically, Plaintiffs do not identify any basis pursuant to which Defendants could be found to have an affirmative duty to subsidize the transfer of poultry litter outside of the IRW. *See* Opp. at 21-22.<sup>29</sup> Accordingly, Plaintiffs cannot establish the requirements of an unjust enrichment cost avoidance theory under Oklahoma law.

### **CONCLUSION**

For the foregoing reasons, summary judgment should be granted on Counts 6 and 10.

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<sup>25</sup> *See* Opp. at 5-6 ¶9, 21-22. As detailed in *Defendants' Motion to Exclude the Testimony of Dr. C. Robert Taylor*, Dkt. No. 2078 at 20-24, this proposed testimony is inadmissible.

<sup>26</sup> Instead, Arkansas law requires that a party affirmatively "must have received something of value." *El Paso Production Co. v. Blanchard*, 269 S.W.3d 362, 372 (Ark. 2007); Mot. at 21.

<sup>27</sup> *See Marmo v. Tyson Fresh Meats*, 457 F.3d 748, 756 (8th Cir. 2006).

<sup>28</sup> *See* Mot. at 22-23; *Burlington N. & Santa Fe R.R. v. Spin-Galv*, 2004 U.S. Dist. LEXIS 30999, \*20 (N.D. Okla. Oct. 5, 2004) (plaintiff must show "an affirmative requirement or duty ... that would have been performed by the Defendant but for the Plaintiff's actions").

<sup>29</sup> Indeed, Plaintiffs concede that Defendants do not incur any costs with respect to the management or disposition of poultry litter. *Compare* Mot. at 5 ¶13; Opp. at 6 ¶13.

Respectfully submitted,

BY: /s/ Jay T. Jorgensen

Thomas C. Green  
Mark D. Hopson  
Jay T. Jorgensen  
Gordon D. Todd  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005-1401  
Telephone: (202) 736-8000  
Facsimile: (202) 736-8711

-and-

Robert W. George  
Vice President & Associate General Counsel  
Tyson Foods, Inc.  
Bryan Burns  
Timothy T. Jones  
2210 West Oaklawn Drive  
Springdale, Ark. 72764  
Telephone: (479) 290-4076  
Facsimile: (479) 290-7967

-and-

Michael R. Bond  
KUTAK ROCK LLP  
Suite 400  
234 East Millsap Road  
Fayetteville, AR 72703-4099  
Telephone: (479) 973-4200  
Facsimile: (479) 973-0007

-and-

Patrick M. Ryan, OBA # 7864  
Stephen L. Jantzen, OBA # 16247  
RYAN, WHALEY & COLDIRON, P.C.  
119 N. Robinson  
900 Robinson Renaissance  
Oklahoma City, OK 73102  
Telephone: (405) 239-6040  
Facsimile: (405) 239-6766

**ATTORNEYS FOR TYSON FOODS, INC.;  
TYSON POULTRY, INC.; TYSON  
CHICKEN, INC; AND COBB-VANTRESS,**

**INC.**

BY: /s/James M. Graves

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

Woodson W. Bassett III  
Gary V. Weeks  
James M. Graves  
K.C. Dupps Tucker  
BASSETT LAW FIRM  
P.O. Box 3618  
Fayetteville, AR 72702-3618  
Telephone: (479) 521-9996  
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753  
George W. Owens  
OWENS LAW FIRM, P.C.  
234 W. 13<sup>th</sup> Street  
Tulsa, OK 74119  
Telephone: (918) 587-0021  
Facsimile: (918) 587-6111

**ATTORNEYS FOR GEORGE'S, INC. AND  
GEORGE'S FARMS, INC.**

BY: /s/ A. Scott McDaniel

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

A. Scott McDaniel, OBA #16460  
Nicole M. Longwell, OBA #18771  
Philip D. Hixon, OBA #19121  
MCDANIEL, HIXON, LONGWELL  
& ACORD, PLLC  
320 South Boston Ave., Ste. 700  
Tulsa, OK 74103  
Telephone: (918) 382-9200  
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley  
MITCHELL, WILLIAMS, SELIG,  
GATES & WOODYARD, PLLC  
425 W. Capitol Avenue, Suite 1800  
Little Rock, AR 72201

Telephone: (501) 688-8800

Facsimile: (501) 688-8807

**ATTORNEYS FOR PETERSON  
FARMS, INC.**

BY: /s/ John R. Elrod

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

John R. Elrod

Vicki Bronson, OBA #20574

P. Joshua Wisley

CONNER & WINTERS, L.L.P.

211 East Dickson Street

Fayetteville, AR 72701

Telephone: (479) 582-5711

Facsimile: (479) 587-1426

-and-

Bruce W. Freeman

D. Richard Funk

CONNER & WINTERS, L.L.P.

4000 One Williams Center

Tulsa, OK 74172

Telephone: (918) 586-5711

Facsimile: (918) 586-8553

**ATTORNEYS FOR SIMMONS FOODS,  
INC.**

BY: /s/ Robert P. Redemann

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

Robert P. Redemann, OBA #7454

PERRINE, MCGIVERN, REDEMANN,

REID, BERRY & TAYLOR, P.L.L.C.

Post Office Box 1710

Tulsa, OK 74101-1710

Telephone: (918) 382-1400

Facsimile: (918) 382-1499

-and-

Robert E. Sanders  
Stephen Williams  
YOUNG WILLIAMS P.A.  
Post Office Box 23059  
Jackson, MS 39225-3059  
Telephone: (601) 948-6100  
Facsimile: (601) 355-6136

**ATTORNEYS FOR CAL-MAINE FARMS,  
INC. AND CAL-MAINE FOODS, INC.**

BY: /s/ John H. Tucker

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

John H. Tucker, OBA #9110  
Theresa Noble Hill, OBA #19119  
RHODES, HIERONYMUS, JONES, TUCKER &  
GABLE, PLLC  
100 W. Fifth Street, Suite 400 (74103-4287)  
P.O. Box 21100  
Tulsa, Oklahoma 74121-1100  
Telephone: (918) 582-1173  
Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich  
Bruce Jones  
Krisann C. Kleibacker Lee  
FAEGRE & BENSON LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
Telephone: (612) 766-7000  
Facsimile: (612) 766-1600  
**ATTORNEYS FOR CARGILL, INC. AND  
CARGILL TURKEY PRODUCTION, LLC**

### **CERTIFICATE OF SERVICE**

I certify that on the 16th of June, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Tina L. Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us
Daniel Lennington, Assistant Attorney General	daniel.lennington@oak.ok.gov

Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	

Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	

J. Randall Miller	rmiller@mkblaw.net
-------------------	--------------------

Louis W. Bullock	lbullock@bullock-blakemore.com
------------------	--------------------------------

Michael G. Rousseau	mrousseau@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
Motley Rice LLC	

Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Motley Rice	

#### **COUNSEL FOR PLAINTIFFS**

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	

Mark D. Hopson	mhopson@sidley.com
----------------	--------------------

Jay Thomas Jorgensen  
Timothy K. Webster  
Gordon D. Todd  
Sidley Austin LLP

jjorgensen@sidley.com  
twebster@sidley.com  
gtodd@sidley.com

Robert W. George

robert.george@tyson.com

Michael R. Bond  
Erin Walker Thompson  
Kutak Rock LLP

michael.bond@kutakrock.com  
erin.thompson@kutakrock.com

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.**

R. Thomas Lay  
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin  
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

**COUNSEL FOR WILLOW BROOK FOODS, INC.**

Robert P. Redemann  
Lawrence W. Zeringue  
David C. Senger  
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net  
lzingue@pmrlaw.net  
dsenger@pmrlaw.net

Robert E. Sanders  
E. Stephen Williams  
Young Williams P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.**

George W. Owens  
Randall E. Rose  
The Owens Law Firm, P.C.

gwo@owenslawfirmnpc.com  
rer@owenslawfirmnpc.com

James M. Graves  
Gary V. Weeks  
Paul E. Thompson, Jr.  
Woody Bassett  
Jennifer E. Lloyd  
Bassett Law Firm

jgraves@bassettlawfirm.com  
pthompson@bassettlawfirm.com  
wbassett@bassettlawfirm.com  
jlloyd@bassettlawfirm.com

**COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.**

John R. Elrod  
Vicki Bronson  
P. Joshua Wisley  
Conner & Winters, P.C.

jelrod@cwlaw.com  
vbronson@cwlaw.com  
jwisley@cwlaw.com

Bruce W. Freeman  
D. Richard Funk  
Conner & Winters, LLLP  
**COUNSEL FOR SIMMONS FOODS, INC.**

bfreeman@cwlaw.com

John H. Tucker  
Leslie J. Southerland  
Colin H. Tucker  
Theresa Noble Hill  
Rhodes, Hieronymus, Jones, Tucker & Gable

jtuckercourts@rhodesokla.com  
ljsoutherlandcourts@rhodesokla.com  
chtucker@rhodesokla.com  
thillcourts@rhodesokla.com

Terry W. West  
The West Law Firm

terry@thewesetlawfirm.com

Delmar R. Ehrich  
Bruce Jones  
Krisann Kleibacker Lee  
Dara D. Mann  
Todd P. Walker  
Faegre & Benson LLP

dehrich@faegre.com  
bjones@faegre.com  
kklee@baegre.com  
dmann@faegre.com  
twalker@faegre.com

**COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC**

Michael D. Graves  
D. Kenyon Williams, Jr.  
**COUNSEL FOR POULTRY GROWERS**

mgraves@hallestill.com  
kwilliams@hallestill.com

William B. Federman  
Jennifer F. Sherrill  
Federman & Sherwood

wfederman@aol.com  
jfs@federmanlaw.com

Charles Moulton  
Jim DePriest  
Office of the Attorney General

charles.moulton@arkansag.gov  
jim.depriest@arkansasag.gov

**COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION**

Carrie Griffith  
**COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON**

griffithlawoffice@yahoo.com

Gary S. Chilton  
Holladay, Chilton & Degiusti, PLLC

gchilton@hcdattorneys.com

Victor E. Schwartz  
Cary Silverman  
Shook, Hardy & Bacon, LLP

vschwartz@shb.com  
csilverman@shb.com

Robin S. Conrad  
National Chamber Litigation Center, Inc.  
**COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND  
THE AMERICAN TORT REFORM ASSOCIATION**

rconrad@uschamber.com

Richard C. Ford  
LeAnne Burnett  
Crowe & Dunlevy  
**COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.**

fordr@crowedunlevy.com  
burnettl@crowedunlevy.com

M. Richard Mullins  
McAfee & Taft

richard.mullins@mcafeetaft.com

James D. Bradbury  
James D. Bradbury, PLLC  
**COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE  
FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS  
ASSOCIATION OF DAIRYMEN**

jim@bradburycounsel.com

I also hereby certify that I served the attached documents by United States Postal Service,  
proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong  
Secretary of the Environment  
State of Oklahoma  
3800 North Classen  
Oklahoma City, OK 73118  
**COUNSEL FOR PLAINTIFFS**

Dustin McDaniel  
Justin Allen  
Office of the Attorney General of Arkansas  
323 Center Street, Suite 200  
Little Rock, AR 72201-2610  
**COUNSEL FOR THE STATE OF  
ARKANSAS AND THE ARKANSAS  
NATURAL RESOURCES COMMISSION**

/s/ Jay T. Jorgensen